THE NATURAL LAW MOMENT IN CONSTITUTIONAL THEORY

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INTRODUCTION

Over the last several years, we have seen an outpouring of legal scholarship about the relationship between natural law and American constitutional theory. Consider just a sample of the work produced since 2016:

1. Jeff Pojanowski and Kevin Walsh's co-authored articles "Enduring Originalism"[1] and "Recovering Classical Legal Constitutionalism";[2]

2. Lee Strang's book *Originalism's Promise*;[3]

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1. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

2. Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

3. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

3. Marc DeGirolami's articles on traditionalism[4] and his forthcoming book *We Mean What We Do: The New Constitutional Traditionalism*;[5]

4. Adrian Vermeule's book *Common Good Constitutionalism*;[6]

5. And a few of my own pieces: "The Role of Emotion in Constitutional Theory,"[7] "The Moral Authority of Original Meaning,"[8] and "Constitutional Theory and the Problem of Disagreement."[9]

Other scholars and works could be added to this list,[10] but this sample should already make clear that something new is happening in American constitutional theory. Never before have so many legal scholars sought to ground constitutional theory in the natural-law tradition. And, if I might add anecdotally, this supply of new scholarship is matched by a demand for it on the part of jurists,

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4. *See, e.g.*, Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 43–49 (2023).

5. MARC O. DEGIROLAMI, WE MEAN WHAT WE DO: THE NEW CONSTITUTIONAL TRADITIONALISM (forthcoming 2025).

6. VERMEULE, *supra* note 2.

7. J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145 (2022).

8. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

9. J. Joel Alicea, *Constitutional Theory and the Problem of Disagreement*, 173 U. PA. L. REV. 321 (2025).

10. For example, though he has not yet published a piece grounding his approach to constitutional theory in the natural law, Sherif Girgis has presented an argument for the compatibility of originalism and the natural law in public remarks. *See* Sherif Girgis, *Are Originalism and Natural Law Compatible?*, CIT (Sept. 1, 2022), https://cit.catholic.edu/events/originalism-natural-law, [https://perma.cc/H5MQ-7R54]. And while my list focuses on American legal scholars, Conor Casey—Vermeule's sometime co-author—has made substantial contributions to the literature in this area as well, *see, e.g.*, Conor Casey, *Constitutional Design and the Point of Constitutional Law*, 67 AM. J. JURIS. 173, 173–97 (2022), as has Richard Ekins, *see, e.g.*, Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49 (2021); Richard Ekins, *How to Be a Free People*, 58 AM. J. JURIS. 163 (2013).

lawyers, and law students alike. Indeed, we can truly say that we are living through a natural-law moment in constitutional theory, a period of unprecedented interest in natural law among constitutional theorists.

In making this claim, I use the terms "constitutional theory" and "natural law" broadly. The term "constitutional theory," for instance, can refer to at least two different kinds of theories. Most commonly in American legal scholarship, it refers to "normative constitutional theories,"[11] which are theories that propose a methodology for resolving constitutional disputes (such as David Strauss's common-law constitutionalism[12]) and offer a justification for adopting that methodology.[13] But "constitutional theory" can also refer to theories of law, which try to identify what *the* law—and more specifically, *our* law—is, but do not necessarily propose a methodology for adjudicating legal disputes.[14] I understand Steve Sachs's original-law originalism to be an example of this type of constitutional theory.[15] I mean to encompass both understandings of "constitutional theory" in my remarks today, except where I make clear that I am using a narrower meaning.

Similarly, by "natural law," I intend a broad meaning that includes a variety of theories and traditions that travel under that banner. Generally speaking, "natural law" refers to those principles and precepts that conduce to the human good and are knowable through human reason.[16] Natural law theory holds that there are

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11. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 545–49 (1999).

12. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894–97 (1996).

13. J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1729–34 (2021).

14. J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 577–78 (2023).

15. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 823–27 (2015).

16. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGIAE pt. I-II, q. 94, art. 2 (Fathers of the Eng. Dominican Province trans., 2d & rev. ed. 1920) (c. 1270). Although the definition I offer here focuses on the moral-philosophical character of natural-law theory, I also mean to include its jurisprudential character, as reflected in the debates between legal positivists and natural lawyers. *See infra* Sections I.A, III.A.

objective goods, understandable in light of human nature, that we can identify through reason, which also means that there are objective moral wrongs.[17] Unlike other moral frameworks, the natural-law tradition would claim that there are some absolute moral wrongs.[18] The tradition's most well-known thinkers include Aristotle,[19] Cicero,[20] and Aquinas.[21]

My assertion that we are living through a natural-law moment in American constitutional theory immediately calls to mind three questions, which will be the focus of my remarks today. First: how, if at all, are the theorists of this moment different from prior theorists who sought to ground constitutional theory in natural law? Second: what explains the rise of natural law in American constitutional theory? Third: what are the implications for constitutional theory of our natural-law moment?

In my limited time today, I would like to sketch answers to these questions, with the caveat that much more could be said about them than I will be able to cover here. For example, my focus will be on the revival of interest in natural law among American constitutional *theorists*, but it is worth noting that there has also been a revival of interest in natural law among American legal *historians*,

17. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2. Among other things, this focus on human goods distinguishes natural-law theories from deontological theories. *See* Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1395 n.61 (1988).

18. 1 JOHN FINNIS, *Moral Absolutes in Aristotle and Aquinas*, *in* REASON IN ACTION: COLLECTED ESSAYS 187, 187–98 (2011). Among other things, this recognition of moral absolutes distinguishes natural-law theories from consequentialist theories. *See* J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 147–48, 165–68 (1997).

19. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (Roger Crisp ed. & trans., Cambridge Univ. Press rev. ed 2014) (c. 384 B.C.E.).

20. *See, e.g.*, CICERO, *On the Laws*, *in* ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., 1999).

21. *See, e.g.*, AQUINAS, *supra* note 16.

such as Stuart Banner,[22] Jud Campbell,[23] Jonathan Gienapp,[24] Richard Helmholz,[25] and others. A complete analysis of our natural-law moment would need to account for this parallel development in legal scholarship, and it would need to examine the potential implications of this historical scholarship for constitutional theory.[26] But I will leave these intriguing lines of inquiry for another occasion.

I. THE DISTINCTIVENESS OF THE NATURAL LAW MOMENT

So let us start with my first question: what makes the theorists of our natural-law moment distinctive, other than the fact that there are more of them now than in previous decades? While there are many things that could be said in response to this question, I will limit myself to three points.

A. Thomism and the Natural Law Tradition

The first distinctive feature of today's natural-law constitutional theorists is that they are self-consciously Thomistic in their approach to natural law.

Now, there are extensive and baroque debates about what "Thomism" is and which natural-law theories are or are not properly classified as "Thomistic,"[27] and I do not intend to wade into those debates here. Rather, by "Thomistic," I simply mean that the constitutional theorists of our natural-law moment rely heavily on the work of Thomas Aquinas and purport to ground their theories in

22. *See, e.g.*, STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021).

23. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264–94 (2017).

24. *See, e.g.*, Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 334–56 (2021).

25. *See, e.g.*, R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142–72 (2015).

26. *See, e.g.*, John O. McGinnis & Mike Rappaport, *The Finished Constitution*, LAW & LIBERTY (Sept. 28, 2023), https://lawliberty.org/book-review/the-finished-constitution/ [https://perma.cc/UQB3-KSVJ]; Pojanowski & Walsh, *supra* note 2, at 447 & n.226; Gienapp, *supra* note 24, at 324.

27. *See, e.g.*, RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987).

Aquinas's thought. For example, all the scholars that I mentioned at the beginning of my lecture expressly adopt Aquinas's classic definition of law: (1) an ordinance of reason, (2) for the common good, (3) promulgated, (4) by a legitimate authority.[28] They build their constitutional theories on this understanding of what law is. But even beyond Aquinas's theory of law, these scholars, to varying degrees, rely on Thomistic arguments about the nature of political authority,[29] the relationship between reason and emotion in the human person,[30] and the moral obligations of jurists, lawmakers, and citizens in relation to law.[31]

By contrast, scholars who wrote about natural law and constitutional theory in previous decades tended not to be Thomistic in their approach. Professors Hadley Arkes and Harry Jaffa, for example, are probably the best-known scholars who consistently wrote about natural law and constitutional theory prior to our natural-law moment, but their theories were quite eclectic, borrowing from and blending together arguments by figures as varied as Aristotle, John Locke, Immanuel Kant, Abraham Lincoln, and George Sutherland.[32] For instance, Professor Arkes's most recent book on natural law, titled *Mere Natural Law*,[33] never cites Aquinas's definition of law, and Aquinas appears on many fewer pages than Abraham Lincoln or James Wilson do. That is not to say that Professors Arkes and Jaffa omit Aquinas from their account of natural law; one cannot really avoid Aquinas when writing about natural law. Professor

28. *See, e.g.*, Pojanowski & Walsh, *supra* note 1, at 117–26; STRANG, *supra* note 3, at 262–63; DeGirolami, *supra* note 4, at 46; VERMEULE, *supra* note 2, at 3; Alicea, *supra* note 8, at 14–15.

29. *See* Alicea, *supra* note 8, at 16–33; STRANG, *supra* note 3, at 246–65.

30. *See* Marc O. DeGirolami, *Establishment as Tradition*, 133 YALE L.J.F. 372, 395–96 (2023); Alicea, *supra* note 7, at 1153–69.

31. *See, e.g.*, Alicea, *supra* note 8, at 43–52; VERMEULE, *supra* note 2, at 43–47; STRANG, *supra* note 3, at 265–95; Pojanowski & Walsh, *supra* note 1, at 122–24.

32. *See* HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION 48–55, 87–91 (2023); Harry V. Jaffa, *Equality, Liberty, Wisdom, Morality and Consent in the Idea of Political Freedom*, 15 INTERP. 3 (1987).

33. ARKES, *supra* note 32.

Jaffa, after all, wrote an entire book on Thomism.[34] But, as a general matter, neither Arkes nor Jaffa grounded his constitutional theory in Aquinas's thought.[35] Rather, they relied on a mixture of theorists and traditions that cannot all be considered Thomistic.

This lack of a Thomistic grounding has ramifications for Arkes's and Jaffa's constitutional theories. Because Arkes, for example, does not rely on Aquinas's definition of law, he is not forced to confront whether his understanding of the judicial role is compatible with the scope of legitimate judicial authority under the American Constitution or with the relevance of the promulgated constitutional text, which are questions that would be difficult for him to avoid were he using Aquinas's definition of law.[36]

My purpose here is not to litigate the merits of Arkes's or Jaffa's theories, nor is it to argue that a Thomistic approach is superior to, or more coherent than, the way in which they conceive of natural law. I am simply pointing out that the lack of a Thomistic grounding for their views has important implications for their constitutional theories, and that the Thomistic grounding of today's theorists likewise has important implications.

B. Constitutional Theorists, Not Philosophers

Of course, there have been some foundational works of American constitutional theory produced by Thomistic theorists prior to our natural-law moment. Among the most important that come to mind are Professor Russell Hittinger's book *The First Grace*[37] and some of Professor Robert P. George's works, such as his book *In*

34. HARRY V. JAFFA, THOMISM AND ARISTOTELIANISM: A STUDY OF THE COMMENTARY BY THOMAS AQUINAS ON THE NICOMACHEAN ETHICS (1952).

35. *See, e.g.*, Harry V. Jaffa, *The American Founding as the Best Regime*, CLAREMONT REV. OF BOOKS (July 4, 2007), https://claremontreviewofbooks.com/digital/the-american-founding-as-the-best-regime/ [https://perma.cc/7C3W-H5C8].; Jaffa, *supra* note 32, at 6.

36. J. Joel Alicea, *Anchoring Originalism*, NAT'L REV. (June 22, 2023), https://www.nationalreview.com/magazine/2023/07/10/anchoring-originalism/ [https://perma.cc/A497-XZ2H].

37. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD (2003).

Defense of Natural Law.[38] Yet, Hittinger and George's contributions highlight a second distinctive feature of today's natural-law constitutional theorists: they are primarily *constitutional theorists*, not *legal philosophers*. They are constitutional theorists who rely on natural-law philosophy, whereas Hittinger and George are natural-law philosophers who sometimes write about constitutional theory.

This might not sound significant, but it can be. While there are exceptions, constitutional theorists tend to be more deeply enmeshed in the specifics of the American constitutional regime than are legal philosophers, and they tend to care more about the *application* of sound legal philosophy to American legal and social practices. Professors Hittinger and George, for instance, are not really concerned with prescribing or defending an approach to constitutional law or adjudication, be it originalist or non-originalist. They have certainly said things about those topics.[39] George, for instance, has at times offered brief natural-law defenses of originalism in his various writings.[40] But these scholars are focused on more foundational questions of the nature of law.

By contrast, all of the natural-law constitutional theorists of our natural-law moment defend originalist[41] or non-originalist[42] constitutional theories and make arguments closer to the ground of American law.[43]

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38. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 102–12 (1999). Some of Professor John Finnis's work could also be mentioned here. *See* Casey, *supra* note 10, at 190–96 (summarizing and analyzing Finnis's work on constitutional adjudication).

39. *See* HITTINGER, *supra* note 37, at 61–84.

40. *See* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001); GEORGE, *supra* note 38, at 111.

41. *See* Alicea, *supra* note 8, at 43–59; STRANG, *supra* note 3, at 278–307; Pojanowski & Walsh, *supra* note 1, at 126–57.

42. *See* DeGirolami, *supra* note 4, at 25–34; VERMEULE, *supra* note 2, at 91–116.

43. *See, e.g.*, Kevin C. Walsh, *Chair Lecture*, CIT (Sept. 7, 2023), https://cit.catholic.edu/events/2023–chair-lecture/ [https://perma.ccM3YXZ-ET5J] (analyzing severability doctrine through the lens of the act-potency distinction); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123–24 (2020) (providing an extensive analysis of traditionalism across multiple areas of constitutional law).

C. Both Originalists and Non-Originalists

This distinction points to the final distinguishing characteristic of the current group of natural-law constitutional theorists: they come in originalist and non-originalist varieties.

This is a significant change from earlier natural-law constitutional theorists like Arkes[44] or Jaffa,[45] who were fierce critics of originalism. While Professors DeGirolami and Vermeule continue in the tradition of non-originalist natural-law constitutional theorists, it is a remarkable fact that most natural-law constitutional theory scholarship produced today comes from originalists.[46]

That is a stark departure from the era in which Judge Robert Bork[47] and Justice Antonin Scalia[48] assailed their natural-law critics and defended originalism in terms that bordered on—and sometimes seemed to pass over into—moral relativism.[49]

II. WHY NOW FOR THE NATURAL LAW MOMENT?

This last observation leads to our second question: what explains the rise of natural law in American constitutional theory at this moment? Since there have always been a few non-originalist natural-law constitutional theorists, what really requires explanation is the existence of originalist natural-law theorists. What has changed since the time of Bork and Scalia that created the possibility of a natural-law moment in constitutional theory that spans the originalist-non-originalist divide?

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44. See ROBERT H. BORK, *Natural Law and the Law: An Exchange* (May 1992), *in* A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 315, 315–20 (2008).

45. *Id.* at 340, 340–47.

46. *Compare* Alicea, *supra* note 8, at 43–59, *with* Vermeule, *supra* note 2, at 91–116.

47. *Id.* at 305–14, 328–33, 347–48.

48. ANTONIN SCALIA, *Natural Law*, *in* SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 243, 243–49 (Christopher J. Scalia & Edward Whelan eds., 2017).

49. *See* Antonin Scalia, *Of Democracy, Morality and the Majority, Address at Gregorian Univ. (May 2, 1996)*, in 26 ORIGINS 81 (1996); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 258–59 (1990) [hereinafter THE TEMPTING OF AMERICA]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971) [hereinafter NEUTRAL PRINCIPLES].

A. Historical Contingencies

Certainly, some of the reasons are historically contingent. For example, there might have been less interest among scholars and jurists about the interaction of natural law and originalism had originalists remained a small minority faction within the federal judiciary, as they were when Bork and Scalia were in their prime. But because originalism in some form is now arguably the dominant methodology among federal judges—including a majority of the Supreme Court[50]—the need for worked out, rigorous justifications of originalism is more relevant to legal scholarship than ever before.[51] And the rise of originalism within the federal judiciary was, of course, the result of innumerable historical contingencies, both legal and political.[52]

Another, perhaps less obvious, historical contingency was the work of two prior generations of natural-law theorists, including Professors John Finnis, Hittinger, and George. These scholars revived interest in the natural-law tradition within parts of the academy. (I should note that Professor Lee Strang has made this point before, so I am borrowing from him here.) How these natural-law theorists accomplished the revival of natural-law theory is a long and complicated story, and it is one that others are better-suited to telling than I am. But without the efforts of these legal philosophers, we can venture to guess that no revival of natural law would be present in constitutional theory today.[53]

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50. This assertion admittedly depends on how one defines originalism. *Compare* Mike Rappaport, *The Year in Originalism*, LAW & LIBERTY (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism/ [https://perma.cc/MRR2-SHHY] (arguing that there are four originalists on the Court, not including Justice Alito), *with* J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 2023 HARV. J.L. PUB. POL'Y *PER CURIAM* 1, 1–2 (2023) (arguing that Justice Alito is an originalist).

51. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. PUB. POL'Y 599, 603–05 (2004) (making a similar observation regarding legal conservatism more broadly).

52. *See generally* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

53. As noted in the text, this paragraph borrows from Strang. For the video and transcript of Strang's remarks on this topic, see Lee J. Strang, *Are Originalism and Natural Law Compatible?*, CIT (Sept. 1, 2022), https://cit.catholic.edu/events/originalism-natural-law/ [https://perma.cc/Ge7Z-DLFV].

Indeed, it is a striking fact that three of the legal scholars who work at the intersection of natural-law and constitutional theory today—Jeff Pojanowski, Sherif Girgis, and myself—were all students of Robert George at Princeton. It is hard to imagine that I'd be writing about natural-law constitutional theory had I not been George's student, and I suspect that Pojanowski and Girgis would say the same thing.

B. Originalism and Moral Neutrality

But there have also been theoretical developments that help explain why we now have a natural-law moment that spans the divide between originalists and non-originalists. Strang, again, has offered helpful insights on this score,[54] but I would suggest that the most important theoretical development was that originalist scholars started embracing the need to make moral truth claims in constitutional theory, at least insofar as the theorist is proposing a methodology of constitutional adjudication.

As I said, most constitutional theories propose a methodology for resolving constitutional disputes and offer a justification for why judges ought to adopt that methodology.[55] For example, Strauss argues that, by and large, judges should resolve constitutional disputes through a common-law, precedent-based methodology, and he offers justifications for that methodology.[56] A constitutional theory that proposes a methodology of constitutional adjudication therefore has to explain why judges *ought* to adopt that methodology.

From the 1970s through the mid-1990s, originalists largely attempted to justify their methodologies without resorting to contested moral truth claims.[57] Bork, for example, emphasized the importance of moral neutrality in constitutional adjudication and refused to provide a worked-out moral argument for originalism,

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54. *See id.*

55. Alicea, *supra* note 13, at 1729–34.

56. *See* Strauss, *supra* note 12.

57. *See* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1418–25 (2021).

arguing instead that originalism was the methodology required by our constitutional history and traditions.[58] Why we should be bound by our history and traditions was never really explained.

When pressed on the need for a moral argument justifying originalism, Bork fell back onto claims that seemed to cross over into moral relativism. Consider his statement, when writing about "fundamental values," that "[t]here is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ."[59]

Bork's approach reflected a broader moral skepticism among early originalists. To be clear, I am not claiming that Bork or other early originalists denied that there are moral truths. While the statement I just read could be understood that way, Bork and other early originalists elsewhere affirmed that there are moral truths.[60] But these early originalists were wary of making moral truth claims in constitutional theory, largely in reaction against what they perceived (correctly, in my view) to be the abuse of judicial power by the Warren and Burger Courts in imposing controversial moral views through constitutional law.[61]

But the ostensible moral neutrality proposed by the early originalists could not endure. Justifying a constitutional methodology requires arguing that judges ought to employ that methodology, which requires making a moral argument that the methodology is better than its competitors.[62] And we can only know the comparative moral soundness of competing methodologies by reference to some standard of moral evaluation.[63] And for a theorist to assert that there is a standard of moral evaluation that other people ought to accept is to assert that the moral standard applies to them

58. *See* Alicea, *supra* note 13, at 1762–63 (providing an overview of Bork's theory).

59. Bork, *Neutral Principles*, *supra* note 49, at 10.

60. *See* ANTONIN SCALIA, *Judges as Mullahs*, *in* SCALIA SPEAKS, *supra* note 48, at 243, 243–48; BORK, THE TEMPTING OF AMERICA, *supra* note 49, at 66.

61. *See* Alicea, *supra* note 8, at 4; Bradley, *supra* note 57, at 1418–25.

62. *See* Alicea, *supra* note 13, at 1773–75; Fallon, *supra* note 11, at 545–49; David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 586–88 (1999).

63. Alicea, *supra* note 8, at 13–14.

as much as it applies to the theorist; this ultimately means—though some further argumentation would be required to show this—that the theorist is asserting that the moral standard is *true*. Therefore, attempting to justify constitutional theories based on social facts or with thin, uncontroversial moral claims will not succeed, since moral truth claims are both necessary to constitutional theory and will inevitably be controversial.[64]

Thus, if originalists wanted judges to accept their view and reject competitor theories, they had to provide a moral argument based on contested moral truth claims. That does not mean that originalist judges necessarily have to make case-by-case moral judgments when adjudicating cases, but it does mean that they necessarily have to make moral judgments *in choosing originalism* over its competitor methodologies.[65]

The gradual realization of this theoretical point coincided with the rise of originalism within the federal judiciary that I noted earlier. To borrow loosely from a point Keith Whittington made in a related context, "As [originalists] found themselves in the majority, . . . [they] needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents."[66] That meant the inadequate moral justifications of the 1970s and 1980s had to give way to stronger justifications.

This confluence of theoretical and historical reasons might explain why the generation of originalists who began writing towards the end of the 1990s and into the early 2000s rejected the ostensible moral neutrality or relativism of the older originalist theories. Thus, Whittington's 1999 book, *Constitutional Interpretation*, offered a moral defense of originalism based on popular sovereignty,[67] and that was followed by works like Randy Barnett's *Restoring the Lost*

64. Alicea, *supra* note 14, at 623–28. There are, of course, challenges to this thesis, including from Rawls and those influenced by him. For a more extensive discussion, see Alicea, *supra* note 9, at 323–36.

65. *See* Andrew Coan, *What Is the Matter with Dobbs?*, 26 U. PA. J. CONST. L. 282, 320, 324 (2024).

66. Whittington, *supra* note 51, at 604.

67. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–59 (1999).

Constitution that likewise grounded originalism in moral truth claims.[68] Indeed, it is often forgotten that Barnett relied on Aquinas for part of his argument.[69]

This embrace of moral truth claims by originalists opened the door to moral justifications rooted in the natural-law tradition,[70] and this occurred around the same time that new generations of future constitutional theorists were being formed in the natural-law tradition by scholars like Finnis, Hittinger, and George. The result was that, whereas Bork famously argued against natural-law critics of originalism by asserting the moral neutrality of originalism, some of his successors argued for originalism based on natural law.[71]

III. IMPLICATIONS OF THE NATURAL LAW MOMENT FOR CONSTITUTIONAL THEORY

So we have a natural-law moment in constitutional theory that is distinctive and that emerged at this time for various theoretical and historical reasons. But why should we care? What are the implications of the natural-law moment for constitutional theory? In this final section of my remarks, I will be highlighting three implications of our natural-law moment. I should preface what I'm going to say by noting that there are other important implications that I do not highlight here, such as the possible role of natural law in situations of legal underdeterminacy.[72] It's also worth noting that

68. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53–117 (2004).

69. *Id.* at 50–51.

70. *See* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006). It is worth noting that Strang was the first among the constitutional theorists of our natural-law moment to begin writing in this area. His work was a pioneering and, for a long time, solo endeavor.

71. *See* Alicea, *supra* note 8, at 43–59; STRANG, *supra* note 3, at 278–307; Pojanowski & Walsh, *supra* note 1, at 126–57.

72. This issue has been a point of disagreement among natural-law constitutional theorists. *Compare* Adrian Vermeule & Connor Casey, *Pickwickian Originalism*, IUS & IUSTITUM (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism/

the extent to which each implication applies might vary with the type of natural-law constitutional theory at issue.

A. Theories of Law and Theories of Adjudication

First, natural-law constitutional theories have a smaller gap between their theories of law and their theories of adjudication than other constitutional theories tend to have. That is to say, once you've bought into the natural-law way of thinking about what law is and how to identify the law, there are normative implications for how you should think about methodologies for resolving legal disputes.

In recent years, several scholars—both originalist and non-originalist—have argued that constitutional theorists should focus more on theories of law rather than on theories of adjudication. They seek to establish a consensus around the law of our Constitution, leaving for another day normative questions like whether we ought to obey the Constitution and how we ought to resolve disputes under the Constitution. Mitch Berman,[73] Will Baude,[74] and Steve Sachs[75] represent this trend in constitutional theory—sometimes called "the 'positive turn'"[76]—and it is not surprising that these scholars are all legal positivists of the Hartian[77] or quasi-Hartian[78] variety. Because Hartian legal positivism defines what law is

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[https://perma.cc/DT88-NWF5] (arguing that resort to natural law is required in situations of underdeterminacy), *with* J. Joel Alicea, *Why Originalism Is Consistent with Natural Law: A Reply to Critics*, NAT'L REV. (May 3, 2022), https://www.nationalreview.com/2022/05/why-originalism-is-consistent-with-natural-law-a-reply-to-critics/ [https://perma.cc/C73D-DJ9T] (arguing that the original meaning of the positive law might itself supply closure rules in situations of underdeterminacy).

73. *See* Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 323–30 (2019); Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–44 (2018).

74. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–54 (2015).

75. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 823–27 (2015).

76. Baude, *supra* note 74, at 2351.

77. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1463 (2019).

78. *See* Berman, *supra* note 73, at 1358–70 (modifying Hartian positivism).

and identifies the law of a jurisdiction according to social facts,[79] it might—if legal positivism is the right way to think about law—be possible to cleanly separate the question of what the law of our Constitution is from the normative questions involved in constitutional adjudication.[80] What the law of our Constitution is would, in a sense, be a descriptive matter, whereas how we should adjudicate constitutional disputes would be a normative matter.[81]

But if we instead adopt the Thomistic understanding of law, normative evaluation is built *into* identification of what the law is,[82] since the focal meaning of law requires that law be an ordinance of reason directed toward the common good and that it be promulgated by a legitimate authority.[83] If one concludes, for example, that the original meaning of the Constitution is the "law" in the fullest sense of that term, it follows that we have a prima facie moral obligation to obey it, since doing so would be good for us both in terms of the law's content and in preserving the authority of its author.[84] Thus, there cannot be a total separation between identifying what the law of our Constitution is and normative questions related to constitutional adjudication. A natural-law theory of the Constitution's legality is closely linked with a natural-law theory of constitutional adjudication.[85]

So one might see natural-law constitutional theorists as mounting a counterargument to the so-called positive turn in constitutional theory. Indeed, Professors Pojanowski and Walsh's "Enduring Originalism" article took the positive turn as its jumping-off point, criticizing Professors Baude and Sachs for their attempt to divorce law-evaluation from law-identification.[86]

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79. *See* H.L.A. HART, THE CONCEPT OF LAW 116–17 (2d ed. 1994).
80. *See* Baude, *supra* note 74, at 2392.
81. *Id.*
82. *See* Pojanowski & Walsh, *supra* note 1, at 110–16.
83. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2.
84. *See* Alicea, *supra* note 8, at 43–45.
85. *Id.*
86. Pojanowski & Walsh, *supra* note 1, at 110–16.

B. Interdisciplinary Constitutional Theory

A second implication of our natural-law moment in constitutional theory is related to the first implication, and it has to do with a long-running debate among theorists about the extent to which constitutional theory is unavoidably interdisciplinary.

Judge Bork once mocked the idea that constitutional theory required "settl[ing] the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the just society, and the like."[87] He thought constitutional theory could be largely separated from the domains of philosophy and other disciplines and be confined to more mundane and technical lawyers' work. In this, Judge Bork represented a persistent strain of constitutional theory that proposes a division of labor between lawyers (who handle constitutional adjudication) and scholars from other disciplines (who handle abstract questions of morality).

On the other side, you have theorists like Richard Fallon, who has argued that constitutional theory is inherently interdisciplinary and "cannot be understood except through an approach that links legal, philosophical, and political scientific inquiries."[88] Fallon urges us to "venture the risk" of going beyond our training as lawyers to integrate other fields into our discussions of constitutional theory.[89]

In this long-running debate, natural-law constitutional theorists and scholars like Professor Fallon are on the same side, though perhaps for different reasons, given Fallon's legal positivism.[90] If we see constitutional theory through the lens of the natural-law tradition, we cannot adjudicate constitutional disputes without resolving antecedent questions of political morality.

For instance, we need to know whether the Constitution furthers

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87. ROBERT H. BORK, *Tradition and Morality in Constitutional Law*, *in* A TIME TO SPEAK *supra* note 44, at 397, 402.

88. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT xi (2018).

89. *Id.*

90. *See id.* at 83–104; Richard H. Fallon, Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008).

the common good,[91] and that requires knowing what the common good is,[92] which requires knowing something about who the human person is and how we flourish as the distinctive kinds of beings that we are.[93] Or, to take another example, we need to know whether the Constitution was promulgated by a legitimate authority,[94] and that requires knowing what makes an authority legitimate,[95] which means investigating why we need authority,[96] and the relationship between authority and human flourishing.[97] So constitutional theory cannot be neatly separated from deep questions of moral and political philosophy.

Many constitutional theorists outside of the natural-law tradition might agree, at a high level of generality, with what I just said, but I would go further and say that natural-law constitutional theory widens the scope of inquiry even more than other constitutional theories tend to do. Because the natural-law tradition situates positive law within a broader understanding of the human good,[98] it calls into service disciplines that American constitutional theorists have generally overlooked.

For example, in proposing various theories of constitutional legitimacy, constitutional theorists have almost entirely ignored the role of emotional or affective attachments to our Constitution, focusing almost exclusively on the best arguments made in favor of one theory or another.[99] But while Aquinas wrote a treatise on law, he also wrote a treatise on the passions, and the two are interlinked because, as Aquinas argued, human beings develop habits or dispositions—which can be either virtues or vices—only when their reason and emotions are pointed in the same direction.[100] *If* one of the

91. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2.
92. Alicea, *supra* note 8, at 20–21.
93.. *Id.* at 19–20.
94. AQUINAS, *supra* note 16, at pt. I-II, q. 94, art. 2; Alicea, *supra* note 8, at 24–43.
95. Alicea, *supra* note 8, at 20–21.
96. *Id.* at 22–24.
97. *Id.*
98. *See* HITTINGER, *supra* note 37, at 3–37.
99. *See* Alicea, *supra* note 7, at 1187–89.
100. *See id.* at 1153–69.

tasks of constitutional theory is to develop a theory of constitutional legitimacy that conduces to the stability and acceptance of the Constitution over time—and many constitutional theorists across the jurisprudential and political spectrum believe that that is one of their tasks[101]—then it needs to be a theory that inculcates in the people a habit or disposition in favor of obedience to the Constitution.[102] And they won't develop that disposition if our theory of legitimacy ignores the traditions, rituals, symbols, concepts, and other practices that align the people's passions with the reasons for obeying the Constitution.[103] Constitutional theory thus has to take into account insights from the science and philosophy of emotion,[104] to take just one example of the way in which natural-law constitutional theory broadens—rather than constricts—our field of inquiry.

Now, as Professor Fallon has observed, this interdisciplinary approach to constitutional theory is uncomfortable for many legal scholars, since it forces us to venture into domains in which we are not experts. And I am not arguing that judges or practicing lawyers cannot do their jobs well without resolving deeply complex questions of political philosophy. But I am arguing, with Fallon, that the field of constitutional theory *does* require exploring such topics, even at the risk of appearing foolish by overstepping our expertise. It is our responsibility to seek out the best scholarship in other disciplines to inform ourselves, as best we can, to the extent necessary to do constitutional theory well.

C. Recovering Sources

This leads to the final implication of our natural-law moment that I want to highlight here, and I will close my remarks with this: natural-law constitutional theorists seek to bring the rest of the field

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101. *See, e.g.*, FALLON, *supra* note 88, at 125–32; JACK M. BALKIN, LIVING ORIGINALISM 59–99 (2011); DAVID A. STRAUSS, THE LIVING CONSTITUTION 99–114 (2010); ROBERT H. BORK, *Styles in Constitutional Theory*, *in supra* note 44, at 223, 235.

102. Alicea, *supra* note 7, at 1185–87.

103. *Id.* at 1169–82.

104. *Id.* at 1153–69.

into conversation with authors and sources that have too-long been neglected in American constitutional theory scholarship.

Most obviously, natural-law constitutional theorists rely heavily on Aristotle and Aquinas. While both figures—especially Aristotle—have played a role in constitutional-theory scholarship over the last several decades (such as in the virtue-ethics work of Professor Lawrence Solum),[105] natural-law constitutional theorists explore the writings of Aristotle and Aquinas in far greater depth than has been typical of American constitutional theorists.[106]

But that is just one example. There are many profound and consequential figures in the natural-law tradition whose work has been almost entirely overlooked by American constitutional theorists. My own scholarship, for example, has attempted to bring constitutional theorists into conversation with thinkers like Cicero,[107] Cajetan,[108] Suárez,[109] Bellarmine,[110] Rommen,[111] and Simon,[112] all of whom have—up until now—played virtually no role in American constitutional theory scholarship.[113] My respectful suggestion is that these giant figures of the natural-law tradition have much to

105. *See, e.g.*, Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003).

106. *See, e.g.*, Pojanowski & Walsh, *supra* note 2, at 416–48; Alicea, *supra* note 7, at 1153–69; STRANG, *supra* note 3, at 142–57.

107. Alicea, *supra* note 9, at 336–45, 360–64 (analyzing CICERO, ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., 1999)).

108. *See* Alicea, *supra* note 8, at 28 nn. 206–07 (citing Thomas Cajetan, *The Apology of Brother Tommaso de Vio of Gaeta, Master General of the Order of Preachers, Concerning the Authority of the Pope Compared with That of the Council, to the Most Reverend Niccolò Fieschi, Well-Deserving Cardinal of the Holy Roman Church, in* CONCILIARISM AND PAPALISM (J.H. Burns & Thomas M. Izbicki eds., 1997)).

109. *See id.* at 27 nn. 198–99 (citing FRANCISCO SUÁREZ, *De Legibus, ac Deo Legislatore, in* 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 383 (James Brown Scott ed., Gwladys L. Williams, Ammi Brown, John Waldron & Henry Davis trans., 1944)).

110. *See id.* at 39 (citing ROBERT BELLARMINE, DE LAICIS OR THE TREATISE OF CIVIL GOVERNMENT 26–27 (Kathleen E. Murphy trans., 1928)).

111. *See id.* at 39 (citing HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY 240 (Cluny Media 2016)).

112. *See id.* at 23 (citing YVES R. SIMON, A GENERAL THEORY OF AUTHORITY 31–50 (1962)).

113. *See id.* at 5–6.

teach us about constitutional theory, and their time of being neglected should come to an end.

In this way, our natural-law moment in constitutional theory holds out the exciting prospect of the discovery—or we might say the *re*-discovery—of insights and arguments that have lain dormant for all these many years, patiently waiting for us to find them. Thank you.